Supreme Court, U.S.
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CASE NO. 84-1918

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

IVEN L. FELT and WILMA FELT,
Petitioners,

v.

FIRST BANK OF SOUTH DAKOTA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Eighth Circuit

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

In reprint at pages 28a-47a of Respondent's Brief, Petitioner Iven Felt executed the following promissory notes in favor of First Bank in Lemmon, South Dakota:

Date	Sum	Payment due
7-13-79	$15,300*	12-1-82
5-4-81	39,269*	11-1-81
5-4-81	25,000*	11-1-81
5-4-81	60,000	11-1-81
5-16-81	7,000	11-1-81
6-8-81	3,500	11-1-81

Petitioner Wilma Felt co-signed the promissory notes above marked with asterisks.

The history of the Parties' banking relationship and status of Respondent's state court action for summary judgment on the foregoing notes is found in First Bank of South Dakota v. Felt, 368 N.W.2d 588, 590-91(S.D. 1985):

> "The Defendants Iven and Wilma Felt have made various transactions with Plaintiff First National Bank for about 20 years. Defendants have always made one payment a year in the fall or after selling the farm products. But after 6 years of no crops -- hail and drought -- there wasn't much to pay with. Even after Defendants made a good sized payment in the fall of 1981, Plaintiff wanted more collateral on the notes at the bank, car title and a third mortgage on the land. Defendants felt that if their collateral had been enough to loan the credit on, it still should be sufficient.

> After making a security check the end of June, 1982, the Bank President asked what would Defendants do if the Bank foreclosed. Defendant Iven Felt said he couldn't see why the Bank couldn't work with him, he could pay it back. But a few days later, July 6, 1982, the Sheriff served Defendants a Summons and Complaint."

In their Answer to Respondent's foregoing 6 July 1982 Complaint for recovery on the aforesaid promissory notes in the Eighth Judicial Circuit Court of South Dakota in and for Perkins County, Petitioners filed a counterclaim based on 15 U.S.C. §§1635 and 1639.

On 12 December 1983, Petitioners initiated this action before the U.S. District Court of South Dakota, and on Respondent's 25 January 1984 motion, the Court, without findings of fact and conclusions of law, dismissed Plaintiffs' Complaint by order of 2 February 1984:

> "for the reason that Plaintiff's Complaint does not state a claim upon which relief may be granted".

By per curiam 18 July 1984 decision of the Eighth Circuit Judges of the U.S. Court of Appeals, the District Court's order was affirmed on the ground that:

> "The allegations of the complaint center on non-compliance with 15 U.S. C. §1635, which provides a right of rescission as to consumer credit transactions in which a security interest is acquired or retained in real property used

> as the residence of the person to whom credit is extended. The security interests involved in this case were in livestock, feed and equipment, not real estate. Therefore, 15 U.S.C. §1635 is inapplicable, and the district court properly dismissed the complaint".

On 23 July 1984, Respondent renewed in state court its motion for summary judgment on the promissory notes herein; on which motion summary judgment in the amount of $157,795.05 was granted by the state court on 4 September 1984; which summary judgment was the subject of Petitioners' appeal in First Bank of South Dakota v. Felt, supra.

Pursuant to Petitioners' 25 September 1984 motion for enlargement of time, this Court's Associate Justice Harry A. Blackmun herein granted Petitioner 30 additional days to file the petition for writ of certiorari herein. Said petition was receipted by this Court's Clerk on 14 November 1984.

Aforesaid pending petition by the Petitioners to this Court and appeal to the Supreme Court of South Dakota notwithstanding, Respondent initiated the 7 February 1985 issuance of a writ of execution ordering the Perkins County Sheriff to satisfy Respondent's aforesaid $157,795.05 summary judgment by levy:

> " . . . out of the personal property of said Judgment Debtor, and if sufficient personal property cannot be found, out of the real property belonging to Defendants . . .".

By its 6 March 1985 letter referred to in its 9 May 1985 letter on file herein to

this Court's Assistant Clerk Edward C. Schade, Respondent confirmed with Mr. Schade that the 13 November 1984 petition for writ of certiorari herein was a "dead file".

On 8 March 1985, the Perkins County Sheriff seized by levy and thereafter sold all the equipment and livestock on Respondents' land in partial satisfaction of the aforesaid $157,795.05 summary judgment.

On 22 May 1985 First Bank of South Dakota v. Felt, supra at 592, held that Petitioners state claims for relief under 15 U.S.C. §1640, and remanded said claims to the state trial court for further proceedings.

ARGUMENTS

I. STATUTE OF LIMITATIONS IS TOLLED BY RESPONDENT'S CONTINUING FAILURE TO COMPLY WITH 15 U.S.C. §§1635, 1639

At page 1 of its Brief, Respondent asserts that Petitioners' 15 U.S.C. §1639 claim is barred by the one-year statute of limitations in 15 U.S.C. §1640(e). Respondent therewith fails to address the question of whether this statutory provision was subject to the doctrine of equitable tolling. The Sixth Circuit has held that the statute is subject to the doctrine of equitable tolling. Jones v. Trans Ohio Savings Association, 747 F.2d 1037, 1041 (6th Cir. 1984). Under this doctrine, the statute of limitations [15 U.S.C. §1640(e)] is tolled when a defendant fradulently conceals the facts which give rise to the cause of action. This federal fradulent concealment rule was first enunciated in Bailey v.

Glover, 88 U.S. 342 (21 Wall.) 22 L.Ed 636 (1875). The Sixth Circuit in Jones concluded that:

> "For application of the doctrine of fradulent concealment, the one year period will begin to run when the borrower discovers or has had a reasonable opportunity to discover the fraud involving the complained of TILA violation. To conclude otherwise would be to accede to the machinations of those who would hope to thwart Congress' purpose and the ability of the federal courts to ensure that purpose's fruition; the prevention of fraud in consumer credit rransactions". Jones v. Trans Ohio Savings Association, 747 F.2d at 1041.

Plaintiffs-Appellants contend that Defendants fradulently concealed the facts which would have given rise to the cause of action. They concealed these facts by their failure to make the disclosures required by 15 U.S.C. 1635 and 15 U.S.C. 1639. Inasmuch as no disclosure has ever been made, the Court should find that the statute was tolled by the fraud of the Defendants in failing to disclose until the Plaintiffs should reasonably have discovered the facts which make up their cause of action.

II. PETITIONERS STATE CLAIM UPON WHICH RELIEF CAN BE GRANTED BY 15 U.S.C. §1639

On the face of five promissory notes (RB(35a-47a)) which are the subject of Petitioners' 15 U.S.C. §1639 claim herein, Respondent failed to disclose to Petitioners information required by 15 U.S.C. §1639(a)(4)(7)(8)(b):

"(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable: . . .

(4) . . . the amount of the finance charge . . .

(7) The default, delinquency, or similar charges payable in the event of late payments.

(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates . . .

(b) . . ., the disclosures required by subsection (a) of this section shall be made before the credit is extended, and may be made by disclosing the information in the note or other evidence of indebtedness to be signed by the obligor."

III. PETITIONERS STATE CLAIM UPON WHICH RELIEF CAN BE GRANTED BY 15 U.S.C. §1635

15 U.S.C. §1635(a) in part provides:

" . . . in . . . any consumer credit transaction in which a security interest, <u>including any such interest arising by operation of law</u>, is . . . acquired in . . . the residence of the person to whom credit is exten-

> ded, the obligor shall have the right to rescind the transaction . . . following the . . . delivery of disclosures required under this section and all other material disclosures required under this part . . . ". (emphasis added.)

To be noted in greater specifics at page 3, supra, a state court writ of execution on 7 February 1985 ordered the county sheriff to satisfy Respondents' summary judgent on the promissory notes at issue by levy and sale on Petitioners' property. Through this operation of law, Respondent retains the right to have Petitioners' residence sold in satisfaction of the balance purportedly owing on the aforesaid state summary judgment. Petitioners are therewith vested by 15 U.S.C. §1635(a) with the right to rescind their credit transaction herein with Respondent, and the right to be notified by Respondent in the promissory notes (RB(28a-47a)) of the particulars of their right to so rescind the notes.

As Respondent has failed to make the foregoing disclosures, Petitioners state a claim by which relief can be granted pursuant to 15 U.S.C. §1635.

IV. PETITIONERS STATE CLAIM UPON WHICH RELIEF CAN BE GRANTED BY 42 U.S.C. §1983

Under color of unconstitutional and ultra vires state statutes, executive actions and judicial proceedings on record with the Perkins County Circuit Court (Civ. 82-1030; Cr. 85-03) and decisions of the U.S. Bankruptcy Court (584-00110) of South Dakota, Respondent continues to deprive Petitioners

of their rights under the U.S. Constitution:

> " . . . to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . . " guaranteed by the Fourth Amendment;
>
> "of trial by jury" guaranteed by the Seventh Amendment; and
>
> "of . . . liberty, or property, without due process of law . . . " guaranteed by the Fourteenth Amendment.

PRAYER FOR RELIEF

On this motion that this Court take judicial notice of the state criminal and civil proceedings against Petitioners described at pages 1-4, 7 supra, and on further motion that their Complaint and prayers for relief be hereby amended to conform with facts and statutory claims of this brief and any decision that may be forthcoming by this Court; Petitioners pray that this Court:

(1) grant Petitioners' hereby renewed:

(a) 12 December 1983 motion for summary judgment in favor of Petitioners against Respondent for relief provided by 15 U.S.C. §§1635, 1639, 1640 and 42 U.S.C. §1983, and

(b) 12 December 1983 and 6 January 1984 motions to rescind and nullify the credit transactions (RB(35a-47a)) and purported security agreements (RB(19a-27a)) with Respondent, and therewith

(2) remand Petitioners' summary judgment on matters of law back to the U.S. District Court of South Dakota for determination by trial of damage amounts Respondent is obligated to pay Petitioners pursuant to 15 U.S.C. §§1635, 1639, 1640 and 42 U.S.C. §1983.

If this Court does not grant Petitioners' foregoing motions and prayer, Petitioners in the alternative pray that this Court grant Petitioners' petition for writ of certiorari to review the decisions by the U.S. District Court of South Dakota and the U.S. Circuit Court of Appeals for the Eighth Circuit dismissing Petitioners' Complaint; and award Petitioners their costs and disbursements, together with any other relief which the Court shall deem just and equitable toward restoring Petitioners' federal constitutional and statutory rights in pursuing their action herein.

Respectfully submitted this 20th day of September, 1985.

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CERTIFICATE OF SERVICE

On 20 September 1985 by first class mail, postage prepaid, I served three copies of this Petitioners' Brief in Reply to

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